

## REMARKS/ARGUMENTS

### ***The Office Action Mailed July 26, 2007***

In response to the Office action mailed July 26, 2007, the status identifiers for each of Claims 11, 35, 37, 39, 72 and 105-106 have been amended to replace the non-compliant text "Withdrawn-Previously Amended" with the approved text "Withdrawn". That is, the Applicant has amended the listing of Claims pursuant to the requirements of 37 C.F.R. 1.121. Accordingly, it is respectfully submitted that each of the aforementioned claims, as presented with this response, is now fully compliant with 37 C.F.R. 1.121.

All amendments made herein were made for the purpose of complying with the requirements of 37 C.F.R. 1.121 only, and were not made for reasons relating to 35 U.S.C. §§ 102 or 103.

### ***Remarks/Arguments Repeated from the Applicant's Response dated July 20, 2007)***

Now, while it is understood that the correction *required* in response to the Office action mailed July 26, 2007 is only the **corrected section** of the non-compliant amendment in compliance with 37 C.F.R. 1.121, the Applicant hereby respectfully confirms and incorporates herein by reference its previous Remarks/Arguments from the Applicant's Response dated July 20, 2007. For the convenience of the Examiner in this regard, the Applicant's Remarks/Arguments from the Response dated July 20, 2007 are respectfully repeated hereinbelow, with notes that have been added along with this present amendment being enclosed in square brackets:

#### ***Introduction***

At the outset, the Applicant notes that this paper [submitted July 20, 2007] is provided in response to Examiner Tran's third restriction requirement. That is, the Applicant has previously filed – on May 19, 2006 and on August 22, 2006 – responses that were fully-compliant with the Examiner's *first and second* restriction requirements (as respectively set out in the Office actions dated April 19, 2006 and July 28, 2006).

Section 707.07(g) of the *Manual of Patent Examining Procedure* ("MPEP") provides that it is appropriate for an Examiner to limit examination of an application to a particular subset of the claims in some situations (e.g., situations where restriction is required, and where a telephone request for election was not successful). That section of MPEP also specifically states that:

"Piecemeal examination should be avoided as much as possible."

At this time, therefore, the Applicant respectfully notes its continuing desire to avoid any perception that the examination of the present application is taking place in a piecemeal fashion, especially in light of the fact that this response is necessitated by Examiner Tran's third restriction requirement.

The Applicant also respectfully notes its prior and continuing desire to avoid excessive costs, undue hardships, and other prejudice to its interests which may have resulted, or which may yet result, from any multiplicity of issued Office actions and/or other delays in the examination of this application.

#### ***Amendments to the Claims***

Claims 1-2, 5-6, 8-44, and 47-110 remain in this application. Claims 3-4, 7 and 45-46 were previously cancelled.

Claims 11, 35-39, 60-73, 103 and 106 were previously withdrawn, as a result of the Examiner's two earlier and consecutive restriction requirements. Now, as discussed in further detail below, claims 92-102, 104-105 and 107-108 are presently withdrawn, as a result of the Examiner's third restriction requirement.

Claim 92 is currently amended, so as to specifically recite a method of using the apparatus of claim 1.

The Applicant respectfully notes that all amendments made to the claims – unless specifically noted otherwise hereinabove – were made for the purposes of clarifying the claims and/or traversing the Examiner's restriction requirements, only, and were not made for reasons relating to 35 U.S.C. §§ 102 or 103.

### ***Restriction Requirement***

In the Office action of June 20, 2007, the Examiner required restriction to one of the following inventions, under 35 U.S.C. § 121:

- I. Claims 1-2, 5-6, 8-44 and 47-91 drawn to a retail merchandising apparatus;  
OR
- II. Claims 92-110 drawn to a method of merchandising a pallet for retail use.

The Applicant accepts that the invention might be characterized as being drawn to two distinct species, i.e., substantially as identified above. In this regard, however, it is the Applicant's respectful position that claims 109 and 110 are actually drawn to a retail merchandising apparatus, and *not* to a method of merchandising a pallet for retail use.

Accordingly, it is the Applicant's respectful position that restriction should more properly have been required, under 35 U.S.C. § 121, to one of the following two species of the invention:

- I. Claims 1-2, 5-6, 8-44, 47-91 and 109-110 drawn to a retail merchandising apparatus (of which claims 11, 35-39 and 60-73 were previously withdrawn); OR
- II. Claims 92-108 drawn to a method of merchandising a pallet for retail use (of which claims 103 and 106 were previously withdrawn).

In this light, therefore, the Applicant hereby elects, with at least partial traverse, to presently further restrict prosecution of this application to species I (claims 1-2, 5-6, 8-44, 47-91 and 109-110) of the invention – save, of course, except for previously withdrawn claims 11, 35-39 and 60-73 – as identified in the paragraph immediately above.

The Applicant retains the right to re-introduce any and all of the previously and/or presently withdrawn claims into the present application upon a finding of allowability in respect of any generic claim, or to re-present these claims in a later filed continuation or divisional application.

In this regard, the Applicant respectfully submits that, with the current amendment of claim 92 (as discussed above), claim 1 is now to be properly identified as being generic to both of the above-identified species of invention.

Accordingly, if claim 1 is hereafter found to be allowable, then pursuant to *MPEP* § 806.05(h), each of claims 92-108 should also be considered for rejoinder.

The Applicant respectfully submits that the present withdrawal of claims 92-102, 104-105 and 107-108 does not affect the inventorship for the present application.

### ***Supplemental Remarks***

As noted previously, Examiner Tran has made telephone calls to the Applicant's representatives to notify them of his three separate restriction requirements. Now – notwithstanding that the Applicant's representatives (a) employ competent staff to answer and direct telephone calls during normal business hours, (b) have a voicemail system in place that has previously proven effective to, 24 hours a day and 7 days a week, monitor and record messages received, and (c) have successfully received innumerable calls and messages from USPTO Examiners over the past several years – the Applicant's representatives do not have any record, nor any recollection, of having received any of the calls referenced by Examiner Tran. This discrepancy is made all the more troubling by the fact that the Applicant's representatives are not now aware of any previous incidents of missed calls or messages, other than the aforementioned calls from Examiner Tran.

From the brief statements made in the aforementioned Office actions, it is uncertain whether or not Examiner Tran (i) successfully telephoned the offices of, (ii) endeavoured to leave voicemail messages for, or (iii) spoke with persons that may have falsely identified themselves as, the Applicant's representatives.

In this regard, it is perhaps worthwhile to note that *MPEP* § 812.01 states that form paragraph ¶ 8.23 (where an election is made), OR form paragraph ¶ 8.23.01 (where no election is made) should be used to make a telephone election of record. Under form paragraph ¶ 8.23.01, Examiner Note 4 specifically states that same should not be used if no contact was made with the Applicant or the Applicant's representative. Regardless of whether an Examiner is successful in contacting the Applicant or the Applicant's representatives, *MPEP* § 812.01 does not make any provision for an Examiner to use any form paragraphs other than ¶ 8.23 or ¶ 8.23.01.

Now, the Applicant's representatives made a telephone call to Examiner Tran on Wednesday July 18, 2007 to notify same of their correct contact information. Additionally, the Applicant's undersigned representative left a voicemail message for Examiner Tran at approximately 12:15 pm on Wednesday July 18, 2007. In that voicemail message, a contact number was left whereat the Applicant's undersigned representative might be reached, and a request was made for the Examiner to return the call. The Applicant's undersigned representative respectfully notes that, although Examiner Tran's outgoing message stated that all calls would be returned within one business day, the Examiner had not returned the aforementioned voicemail message by the time the [present] response was filed, by EFS, on the afternoon of Friday July 20, 2007 [and neither had the Examiner returned the aforementioned voicemail message by the time this response – i.e., to the Office action mailed July 26, 2007 – was filed, by EFS, on the morning of Tuesday August 7, 2007].

The Applicant's representatives also made a telephone call to the USPTO Electronic Business Center on Wednesday July 18, 2007. In that telephone call, the Applicant's undersigned representative confirmed that the USPTO has the correct contact telephone number for the Applicant's representatives (Customer No. 6431) on file. The USPTO Electronic Business Center also confirmed that this correct contact telephone number would have been readily available and apparent to any and all Examiners working on applications associated with said Customer No. 6431.

Moreover, the Applicant's undersigned representative also respectfully notes that, in order to facilitate telephone calls from the Examiner, the most-recent amendment filed (on April 2, 2007) in this case included the area code and complete telephone number (substantially adjacent to the signature) of the Applicant's undersigned representative in full compliance with the recommendations contained in MPEP § 408 and § 714.01.

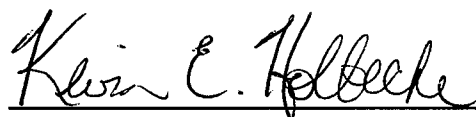
### ***Summary***

Now, fully responsive to the Office action mailed July 26, 2007 – and having, for the present convenience of the Examiner, respectfully repeated each of the Applicant's Remarks/Arguments from its Response dated July 20, 2007 – it is believed that the

present amendment is fully compliant with 37 C.F.R. 1.121 (and with the Examiner's third restriction requirement).

Additionally, the Applicant respectfully submits that the claims of this application are presently in condition for allowance, and as such, reconsideration of the above-identified application with a view toward timely issuance of a Notice of Allowance is hereby respectfully requested. If after reviewing this response, the Examiner believes that a telephone or personal interview would facilitate the resolution of any remaining matters, the undersigned attorney may be contacted at the number set forth hereinbelow.

Respectfully submitted,



Kevin E. Holbeche

Registration No. 56,495

Tel: (416) 307 - 4166

Date: August 7, 2007

LANG MICHENER LLP  
BCE Place, 181 Bay Street, Suite 2500  
Toronto, Ontario  
Canada M5J 2T7  
Tel: (416) 307 - 4166  
Fax: (416) 365 - 1719

KEH/ms